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Reply to: Virginia

June 2, 2016

Via Email Only
Mayor Mike Huether
224 W. Ninth Street
P.O. Box 7402
Sioux Falls, SD 57117
mhuether@siouxfalls.org

RE: Proposed "gender identity" amendment to Chapter 39

Dear Mayor Huether:

Liberty Counsel commends the withdrawal of the proposals regarding "sexual orientation" and "gender identity" and **"**AN ORDINANCE OF THE CITY OF SIOUX FALLS, SD, AMENDING THE CODE OF ORDINANCES OF THE CITY BY AMENDING CHAPTER 98: HUMAN RELATIONS" ("the Human Relations Ordinance" or "HRO") by the City of Sioux Falls ("City"). The amendments to Chapter 98 of the HRO contained a number of serious infirmities, which were detailed in Liberty Counsel's May 17, 2016 letter.

I write currently regarding the proposed addition of "gender identity" to Chapter 39, city employment and city employees. With the addition of "gender identity," § 39.042, Discrimination, would state as follows**:** "No person in the civil service or seeking admission thereto shall be appointed, reduced or removed, or in any way favored or discriminated against because of his or her race, color, religion, sex, sexual orientation, **gender identity,** national origin, creed, ancestry, pregnancy, age, genetic information or disability." The City risks no loss of federal funding by rejecting the addition of "gender identity" and maintaining the status quo in protected categories; moreover, the proposed addition of "gender identity" as a protected category under Chapter 39 is otherwise unnecessary, and is inappropriate for several reasons.

First, this proposal creates conflict where none previously existed between employee protected classes. Chapter 39 already protects against discrimination based on "sex." If "gender identity" is added, the existing protections against sex-based discrimination will be eviscerated, eliminating an objective category of "male" or "female," by enshrining a subjective category in which a claim of mental opposite-sex "identity" overrides sex-based privacy regulations.

Second, Title VII[1] (covering employees) only prohibits discrimination between males and females based on biological "sex." It does not require the abolition of personal privacy in places of employment. The statute does not require or support the idea that males *are* females, that females *are* males, or the recognition of "gender identity" or "gender expression." Congress has rejected multiple attempts to amend Title VII, over the 40+ year history of this statute, where these attempts tried to include specific recognition of "gender identity." Title VII does not require admission to opposite-sex restrooms, lockers, showers, or other traditionally private places. In rejecting the claim that bans on sex-based discrimination would eliminate private facilities separated on the basis of sex, on April 7, 1975, Supreme Court Justice Ruth Bader Ginsburg, then a professor at Columbia Law School, wrote in The Washington Post, "**Separate places to disrobe, sleep, perform personal bodily functions are permitted**, in some situations **required**, **by regard for individual privacy**."[2] (Emphasis added).

Third, numerous federal (and state) court decisions have held that it is appropriate to limit the use of restrooms and lockers on the basis of biological sex. *See, e.g., Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* No. CIV.A. 3:13-213, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015) (rejecting female "transgender" claim of access to male restrooms and lockers); others have found no "discrimination" based on "transgender" status: *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir.2007); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir.1995); *Braninburg v. Coalinga State Hosp.,* No. 1:08–cv–01457–MHM, 2012 WL 3911910, at *8 (E.D.Cal. Sept.7, 2012) ("it is not apparent that transgender [sic] individuals constitute a 'suspect' class"); *Jamison v. Davue*, No. S–11–cv–2056 WBS, 2012 WL 996383, at *3 (E.D.Cal. Mar.23, 2012) (so-called "transgender" individuals do not constitute a 'suspect' class, so allegations that defendants discriminated...are subject to a mere rational basis review"); *Kaeo–Tomaselli v. Butts*, No. 11–cv–00670 LEK, 2013 WL 399184, at *5 (D.Haw. Jan.31, 2013) (noting the plaintiff's status as a claimed "transgender" person did not qualify the plaintiff as a member of a protected class and explaining the court could find no "cases in which transgender [sic] individuals constitute a 'suspect' class"); *Lopez v. City of New York*, No. 05–cv–1032–NRB, 2009 WL 229956, *13 (S.D.N.Y. Jan.30, 2009) (explaining that because such individuals are not a protected class for the purpose of Fourteenth Amendment analysis, claims that a plaintiff was subjected to "discrimination" based on his status as a "transgender" are subject to rational basis review); *Goins v. West Group,* 635 N.W.2d 717 (Minn.2001) (in rejecting claim by male to female "transgender" employee, that employer's designation of employee restroom use based on biological sex was "discrimination" in violation of the Minnesota Human Rights Act).

Fourth, the right to bodily privacy has long been recognized in U.S. law, and applies with full force to City employees who would otherwise be forced by the proposed amendment to Chapter 39 to give up that right of privacy as a condition of employment. *See, e.g., Doe v. Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011) (holding that bodily exposure may meet "the lofty constitutional standard" and constitute a violation of one's reasonable expectation of privacy); *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) ("there is a right to privacy in one's unclothed or partially unclothed body"); *York v. Story*, 324 F.2d 450, 455 (9th Cir.

[1] Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.

[2] https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/09/prominent-feminist-bans-on-sex-discrimination-emphatically-do-not-require-unisex-restrooms/

1963) ("We cannot conceive of a more basic subject of privacy than the naked body."). Violations of the right to bodily privacy are most acute when one's body is exposed to a member of the opposite sex. *See Doe*, 660 F.3d at 177 (considering whether "Doe's body parts were exposed to members of the opposite sex" in deciding whether her reasonable expectation of privacy was violated); *Brannum v. Overton County School Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) ("the constitutional right to privacy... includes the right to shield one's body from exposure to viewing by the opposite sex"); *York*, 324 F.2d at 455 (highlighting that the exposed plaintiff was female and the viewing defendant male); *Poe*, 282 F.3d at 138 (citing with approval the Ninth Circuit's emphasis on the different genders of defendant and plaintiff in *York*). Thus, the proponents of "gender identity" or "transgender" admission to opposite-sex restrooms, lockers and other places completely ignore this long-standing right to bodily privacy.

Fifth, in addition to eliminating City employees' sex-based expectations of privacy at their places of employment, the proposed amendment to Chapter 39 creates conflict between the public's expectations of privacy, and the behavior of public servants. If "gender identity" is added to Chapter 39, any city-owned facility where city employees work would now be required to open all sex-specific facilities to gender-confused individuals. Since gender identity is a personal, internal "belief" that cannot be questioned when an individual enters a sex-specific area, this policy creates an environment where the protection of the right to privacy and safety can only take effect ***after*** someone is harmed. That harm may be overt, like sexual assault, or it may be covert, like "mere" voyeurism or observation of members of the opposite sex in a state of undress or while performing private bodily functions. It is unworkable to require female members of the public, for instance, to question any man they encounter in a City-owned women's restroom as to his employment status. Women cannot read the minds of a male in such a facility, and cannot know whether he is there to use the restroom; "merely" ogle them, or sexually assault them. It is better to have a bright-line, objective standard of biologically sex-separated facilities. An open bathroom policy, ostensibly limited to "City employees" still gives legal permission for voyeurs and sexual predators to enter opposite-sex, City-owned restroom and locker rooms, placing the public at risk.

Finally, it is undeniable that cases exist where predatory males have used policies and ordinances like those proposed in Sioux Falls to gain access to their victims, by means of a new "right" to be where they were not allowed before. This fact does not suggest that all or even most individuals experiencing gender confusion are dangerous; but such policies are not limited to those who may sincerely believe they are the opposite sex, nor can they be, because such access is based on a mere subjective assertion.

Policies which allow men and boys into the same space where women and girls engage in private bodily functions, undress, or shower create dangerous opportunities for biological males with bad intentions. Liberty Counsel's webpage on "transgender" incidents[3] details more than fifty (50) incidents of "bad intentions," where men dressed as women were caught observing, videoing, groping, molesting, attacking, raping, exposing their genitals, or otherwise assaulting or frightening women and children, primarily girls. **Sixteen (16) of those incidents occurred in locker rooms or bathrooms**, with two in a women's shelter. Why

[3] http://www.lc.org/transgender

should the City take this chance with the safety of female City employees, or female members of the public, who use City facilities?

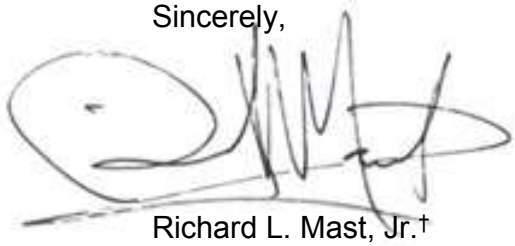
If the City is truly interested in protecting against unlawful discrimination, and sending a message of diversity and inclusion, it should consider revamping its collection of nondiscrimination ordinances, starting with Chapter 39. It is simply unworkable to continually add "special protections" for additional "protected classes," based on an ever-expanding list of special characteristics, unless the City seeks to engage in social engineering.

It would be better to strike most of the existing language in Chapter 39.042, and replace it with a statement similar to the City's current Equal Opportunity statement: "The City of Sioux Falls does not discriminate in the provision of services and in employment. The City treats all people with respect based on their dignity and worth as a human being, which cannot be enhanced or diminished by government. The City hires, employs and promotes individuals based solely on individual merit and job performance. No person in the civil service shall be appointed, reduced or removed, or in any way favored or discriminated against on any unlawful basis, consistent with South Dakota and federal law."

Regardless of such a solution, the City has an obligation to protect its employees and members of the public from privacy violations inevitably precipitated by adding "gender identity" as a City employment non-discrimination category. The City should not infringe upon the privacy, safety, and modesty rights of female employees, nor of members of the public, who will encounter not only gender-confused individuals, but also persons claiming access for more nefarious reasons. The City should therefore reject the proposed amendment adding "gender identity" to Chapter 39's nondiscrimination provisions.

Should you have any questions about any of the points contained in this letter, please do not hesitate to contact me at 407-875-1776.

Sincerely,



Richard L. Mast, Jr.†

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